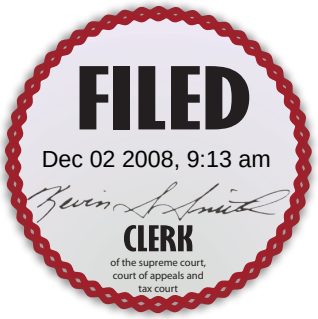

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IN THE
COURT OF APPEALS OF INDIANA

C.L.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 47A01-0806-CV-295
	)	
D.D.	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE LAWRENCE CIRCUIT COURT
The Honorable Andrea K. McCord, Judge
Cause No. 47C01-0705-AD-8

December 2, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

C.L. (Appellant) appeals the adoption of his children, then thirteen-year-old B.J.L. and then nine-year-old M.J.L. (collectively, the Children) by the Children's step-father, D.D. Appellant contends the trial court erred in (1) finding that he failed to communicate significantly with the Children, while able to do so, for a period of at least one year under Ind. Code Ann. § 31-19-9-8(a)(2)(A) (West, PREMISE through 2007 1st Regular Sess.), (2) concluding that the adoption could be granted without Appellant's consent, and (3) ultimately granting the adoption.

We affirm.

The facts favorable to the judgment are that Appellant and K.D. (Mother) lived together from approximately 1993 to 2002. During that time, they had two children, B.J.L. and M.J.L. The relationship soured and they ceased living together in 2001 or 2002. Mother married D.D. in the summer of 2003. The critical time period for purposes of this appeal spans from the day Appellant moved out of Mother's house until May 11, 2007, when D.D. filed a petition to adopt the Children. Specifically, for reasons which will be explained below, our focus is on Appellant's contact with the Children during that time period.

Appellant saw the Children only three times between November 2002 and June 2004.[1] Each of the visits was between fifteen and thirty minutes in length, and each occurred at the home of Mother's mother. Thirteen months elapsed between the second and third visits. After the June 2004 visit, Appellant did not see the Children until December 2006. During

[1] In the "facts" section of his appellate brief, Appellant claims, "After the separation and up until the summer of 2003, when [Mother] married her current husband, [Appellant] continued to have daytime visits with the children, primarily at the maternal and paternal grandmothers' homes." *Appellant's Brief* at 4. This assertion is quite at odds with the evidence (including Appellant's own testimony on the subject), and even if there was evidence to support this claim, it certainly cannot be characterized as among the facts most favorable to the court's judgment – the view thereof that we are bound to consider pursuant to our standard of review. *See*

that period of time, his contact with the Children was limited to a single telephone call – in September 2005 – and on that occasion he spoke with them only "briefly". *Transcript* at 223. Appellant did not see the Children again until the spring of 2007. From the time he and Mother separated until then, Appellant did not send any letters, cards, or gifts to the Children.

In December 2006, Appellant contacted Mother and told her he had been diagnosed with paranoid schizophrenia sometime in 2003, and that he had undergone treatment for the condition over the past several years. At one time, his symptoms included hearing voices, the inability to talk, staying in bed, and muscle tightening. By late 2006, the most serious symptoms were controlled by medication. He also informed Mother that he had received in-patient care for three months and by then had spent a total of eighteen months in two different transitional care facilities. Mother declined his request to visit with the Children.

On April 25, 2007, Appellant filed a paternity action in Monroe Circuit Court requesting a hearing on the issues of parenting time, child support, and custody. On May 11, 2007, D.D. filed a petition for adoption in the Lawrence Circuit Court. Following an August 6, 2007 hearing, the Monroe Circuit Court issued a parenting time order, granting Appellant supervised visitation with the Children for four hours every other Sunday, and ordering him to pay child support. On October 3, 2007, the Lawrence Circuit Court conducted a hearing on D.D.'s adoption petition. Appellant appeared at the hearing and opposed adoption. On October 17, 2007, the Lawrence Circuit Court issued findings of fact and conclusions of law in support of its order granting D.D.'s petition to adopt the Children. Among other things, the court concluded that Appellant's consent was not required. Appellant challenges the

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Rust v. Lawson, 714 N.E.2d 769 (Ind. Ct. App. 1999), *trans. denied*. We will not take the time to point out

adoption order on that basis.

This appeal involves essentially only one issue: was the trial court correct in determining that Appellant's consent was not required in D.D.'s adoption action? The matter of parental consent for adoption in this case is governed by I.C. § 31-19-9-8(a)(2)(A) (West, PREMISE through 2007 1st Regular Sess.), which states, in relevant part, as follows:

> Consent to adoption, which may be required under section 1 of this chapter, is not required from … [a] parent of a child in the custody of another person if for a period of at least one (1) year the parent … fails without justifiable cause to communicate significantly with the child when able to do so.

Pursuant to the foregoing provision, Appellant's consent was not required if D.D. could prove[2] that Appellant failed without justifiable cause to communicate with the children at a time when he was able to do so. Our standard of reviewing the decision that parental consent is not required in an adoption proceeding is well settled and is set out as follows:

> When reviewing the trial court's ruling in an adoption proceeding, we will not disturb that ruling unless the evidence leads to but one conclusion and the trial judge reached an opposite conclusion. We will not reweigh the evidence, but instead will examine the evidence most favorable to the trial court's decision together with reasonable inferences drawn therefrom, to determine whether sufficient evidence exists to sustain the decision. We note that a petitioner for adoption without parental consent bears the burden of proving the statutory criteria for dispensing with such consent in Ind. Code § 31-19-9-8(a)(2) by clear, cogent and indubitable evidence. If the evidence most favorable to the

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each such discrepancy in the remainder of this opinion.

[2] We note that one argument made by Appellant concerns the allocation of the burden of proof. Appellant contends the trial court erroneously placed the burden on him (Appellant) to prove he did not fail to communicate with the Children for the requisite period of time, and that any such failure (i.e., his inability to communicate) was justifiable. We hereby reject this argument, noting simply that the trial court's spot-on recitation of the appropriate burden in its adoption order (i.e., "[i]n the instant hearing, the burden of proof lies with [D.D.], who must prove by clear, cogent, and indubitable evidence that [Appellant's] consent is not required") was not mere lip service to the correct standard. The court clearly placed the onus upon D.D. to prove both that Appellant's lack of communication with the Children was for the requisite period of time and that Appellant's failure to communicate came at a time when he was able to do so.

> judgment clearly, cogently, and indubitably establishes one of the criteria for granting adoption without parental consent and, thereby, for the termination of parental rights without consent, we will affirm the judgment. Finally, the decision of the trial court is presumed to be correct, and it is the appellant's burden to overcome that presumption.

Rust v. Lawson, 714 N.E.2d at 771-72 (internal citations to authority omitted).

We begin with the observation that it cannot seriously be disputed that the amount of Appellant's communication with his children was very low – nearly nonexistent for almost five years – easily meeting the requirements of I.C. § 31-19-9-8(a)(2)(A). In fact, the following excerpt from the court's adoption order succinctly describes just how sparse the level of communication between the Appellant and the Children was:

> It is clear by the evidence that [Appellant] had only seen the children two (2) times and had spoken to them over the phone at most three (3) times in five (5) years. [Appellant's] total contact consisted of one (1) hour in November 2002 and fifteen (15) minutes in June 2004. [Appellant] sent no cards, presents or other correspondence. [Appellant's] three (3) or fewer phone calls were minimal in duration. The Court finds that these efforts to communicate, give [sic] the totality of the time frame (five years) that [Appellant's] efforts were nothing more than token efforts. *Rust v. Lawson*, 714 N.E.2d 769 (Ind. App. 1999), "In order to preserve the consent requirement for adoption, the level of communication with a child must not only be significant, but also must be more than token efforts on the part of the parent."

Appellant's Appendix at 7. We need not delve in detail into the evidence supporting the above conclusions. Although Appellant may quibble about what amounts to very minor and ultimately inconsequential variances between the court's findings and what he essentially admitted concerning his contact with the Children, the evidence clearly supports the trial court's findings and conclusions that Appellant's contact with the Children during the relevant time period was almost non-existent. The real thrust of Appellant's argument on appeal does not focus on whether D.D. proved Appellant had insufficient contact with the

children to preserve his right to consent. Rather, it focuses on whether D.D. proved Appellant failed to maintain adequate contact with the Children "when able to do so."

Appellant is correct in observing that I.C. § 31-19-9-8(a)(2)(A) provides that in order to prove that Appellant's consent was not required, it was incumbent upon D.D. to prove not only that Appellant failed to communicate significantly with the Children, but also that such failure came at a time "when [Appellant was] able to do so." Appellant claims that his failure to communicate with his children was the result of his mental illness, which he claims rendered him incapable of communicating with them. Thus, the argument goes, the trial court erred in concluding that Appellant *was able* to communicate with the Children during the relevant time period.

We first wish to clarify that we agree at least in principle that mental illness might interfere with a parent's ability to communicate with his or her children to such an extent that it would render that parent unable to communicate within the meaning of I.C. § 31-19-9-8(a)(2)(A). Also, we agree that there is evidence that Appellant's mental illness may have briefly rendered him unable to communicate with the Children during the relevant time period. Unfortunately for Appellant, however, there is no evidence that those periods of arguably significant debilitation did not occur often enough or last long enough to bring him within the exception that he claims applies here. Appellant testified that he was hospitalized in a mental health facility for only three months of that almost five-year period, and additionally was in what he termed "transitional care facilit[ies]" in Monroe County, Indiana on two separate occasions for between three and eighteen months. *Transcript* at 49. During the period in question, he also lived in Louisville, Kentucky for a time. Citing his mental

illness and his spotty memory, Appellant was able to provide few details regarding specific times and places relative to the critical period. After hearing all of this evidence, the trial court concluded that, not counting the time he spent as a patient in the mental health facility, he did not attempt communication for the requisite one-year period of time when he was not restricted by hospitalization. Moreover, it is clear that the trial court determined that his mental condition when not hospitalized did not render him incapable of contacting the Children. There is evidence to support this conclusion.

In summary, although we can envision circumstances in which a parent's mental illness would be so debilitating that it would render that parent unable to communicate with his or her children within the meaning of I.C. § 31-19-9-8(a)(2)(A), this is not such a case. The evidence established "clearly, cogently, and indubitably" that Appellant failed, when he was able to do so, to communicate significantly with the Children for a period of at least one year. *Rust v. Lawson,* 714 N.E.2d at 771. Having thus determined that one of the criteria for granting adoption without parental consent had been established, the trial court did not err in issuing the adoption order without Appellant's consent.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur